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## Reflections on Discrimination

Alan Wertheimer

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# Reflections on Discrimination

ALAN WERTHEIMER\*

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## I. INTRODUCTION

I take it that my principal qualification for being asked to participate in the workshop that gave rise to this paper is that I published an article, *Jobs, Qualifications, and Preferences* (JQP) in 1983, in which I discussed an issue that had not received sufficient attention.<sup>1</sup> Arguments for affirmative action frequently appealed to the social and psychological advantages that would accrue from greater racial and sexual diversity, with the “role modeling” effect being top on the list. These were not arguments for preferential treatment, properly understood, but were instead arguments for broadening our conception of the job itself and,

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\* Visiting Scholar, Department of Clinical Bioethics, National Institutes of Health. Professor Emeritus of Political Science, University of Vermont.

1. Alan Wertheimer, *Jobs, Qualifications, and Preferences*, 94 ETHICS 99 (1983).

therefore, what counts as a qualification for a job. On this view, a woman mathematics professor who could serve as a role model for female students might actually be more qualified than an otherwise better qualified male, if encouraging female students to pursue math were regarded as one of the qualifications for the job. It did not take a genius to see that this line of argument had potentially disturbing implications. For if being a member of a historically oppressed or disadvantaged group could be an asset in certain jobs, it could also be a liability.

For example, and as an empirical matter, it is possible that students will learn less from an otherwise better qualified female mathematics professor than a lesser qualified male because they do not take a female mathematics professor seriously. Moreover, this was not a small problem. For as soon as one begins to think about the characteristics of jobs, it becomes quite apparent that success in many jobs turns on the reactions of customers (clients, students, targets) or coworkers to the behavior and characteristics of an employee, and so we need to determine when such reactions count as bona fide occupational qualifications and when they do not.

Intuitively, it seems that it is sometimes legitimate to count what I called “reaction qualifications” (to use an unattractive expression) and sometimes not. In *Diaz v. Pan American World Airways, Inc.*<sup>2</sup> the Fifth Circuit considered whether Pan American’s policy of hiring only females as flight attendants was a form of illegal discrimination, even if it were a wise business decision given the preferences of its customers, most of whom were male.<sup>3</sup> The court said “it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices that [Title VII of the 1965 Civil Rights Act] was meant to overcome.”<sup>4</sup> Although the Fifth Circuit seemed to think it is easy to determine what counts as the sort of prejudice the Act was meant to overcome and those reactions which can legitimately be counted, I thought then and continue to think that this is much more difficult than is often supposed. Although I made some suggestions as to how we might distinguish between those cases, my answers were messy and unsatisfactory. Moreover, I now think that the case for counting arguably illegitimate reactions is somewhat stronger than I once thought.

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2. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971).

3. *Id.* at 387.

4. *Id.* at 389.

Although my desire to participate in Professor Alexander's workshop was sufficient to motivate my acceptance of his invitation, the fact is that I have not written a word about these issues since the early 1980s. And while I did take this occasion to read some of the legal scholarship on the issue, particularly the scholarship produced by some of those in attendance at this workshop, I have not kept up with what is now an enormous body of literature. With these preemptive strikes being launched, my plan is to offer some reflections—not a sustained and well-integrated argument—on the themes of the conference and on some arguments advanced by Professors Kelman and Yuracko, who have produced some of the most important scholarship on the topic.<sup>5</sup> I will also offer some updated reflections on reaction qualifications and the arguments for “laundering preferences” in formulating social policy.

In the background are two claims that I want to put on the table. First, although it may be wrong for people to engage in a particular form of discrimination, it does not follow that the government should seek to prevent that discrimination. Second, although it may not be wrong for people to engage in a particular form of discrimination, it does not follow that it would be wrong for the government to seek to prevent that discrimination or to mitigate its effects. The wrongness of individual behavior is obviously related to the justifiability of state action, but the correlation is by no means perfect.

## II. DISCRIMINATION

### *A. The Rhetoric of Discrimination*

The rhetoric of discrimination is still powerful. Although scholars understand the distinction between the descriptive and neutral sense of discrimination, under which to discriminate is simply to make distinctions, and the morally loaded sense of discrimination, the word continues to be a conversation stopper. To label a form of distinction-making as discrimination is to say that it is wrong and seems to require the distinction-maker to defend his practice. If we think it is seriously wrong not to build ramps for the disabled, we refer to it as discrimination. If we are less adamant, we may ask whether we should

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5. See Mark Kelman, *Defining the Antidiscrimination Norm to Defend It*, 43 SAN DIEGO L. REV. 735 (2006); Kim Yuracko, *Sameness, Subordination, and Perfectionism*, 43 SAN DIEGO L. REV. 857 (2006).

provide accommodations to the handicapped. In my view, nothing turns on the label. The question is whether we should build ramps, not whether *not* doing so is discrimination or nonaccommodation. If we think that affirmative action or preferential treatment is wrong, we refer to it as reverse discrimination. If we think that the use of proxies is wrong, we refer to it as stereotyping or profiling or discrimination. No one ever claims that law schools discriminate when they use college grades in deciding whom to admit (although such claims are sometimes made with respect to LSATs). If one wants to oppose the use of genetic markers in setting insurance premiums, one refers to it as “genetic discrimination.” We rarely say that it is permissible to “discriminate” on the basis of race in choosing one’s friends or mates. We do not use the word. And (virtually) no one says that heterosexuals and homosexuals “discriminate” in their choice of sexual partners.

The invocation of the word *discrimination* seems to presuppose that some decisionmaker is responsible for the resulting inequality of results. No one says that we discriminate when we choose to watch male basketball players or female ice skaters even if it turns out that the aggregation of such preferences yield a pay structure in which male basketball players earn more than female basketball players and female professional ice skaters earn more than male professional ice skaters. By contrast, it has been argued that Wimbledon discriminates against women because the prize for winning the women’s championship is less than the prize for the men.<sup>6</sup> We do not regard it as wrong when market forces produce higher income for some jobs than others or when market forces add jobs in one sector and reduce jobs in another. Moreover, whereas we worry about discrimination in hiring for jobs, we do not worry as much if a job is *not* created, if there are few jobs for French horn players but many more for violinists. Moreover, whereas we may think it important not to discriminate when *hiring* for a job, we do not view the practice of *not firing* as wrongful discrimination against the more qualified unemployed, a phenomenon for which many college professors are no doubt thankful.

### B. *What Makes Discrimination Wrong?*

I believe that Larry Alexander’s article, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*,

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6. Associated Press, *Men’s Winner Will Still Earn More Than Women’s* (April 26, 2006), available at <http://sports.espn.go.com/espn/print?id=2420833&type=story>. The French and U.S. Open offer equal prizes to both men and women singles champions. See Mark Rice-Oxley, *Venus Williams at Wimbledon: Show Women the Money*, CHRISTIAN SCI. MONITOR (Boston), June 29, 2006, at 1.

was the first systematic attempt to grapple with the question it poses.<sup>7</sup> Although we will return to his answer below, here I want to pursue his question. When confronted with the question, “Why is it wrong to discriminate on the basis of race or sex?,” many will respond that it is wrong because a person has no control over those characteristics. It does not take much to show that this cannot be the right answer. If individual acts of discrimination are intrinsically wrong, it must be for one of several reasons: (1) they fail to give people what they deserve; (2) they violate the target’s rights; (3) they demean, stigmatize, or express wrongful values towards the target; or (4) they fail to treat people on the basis of the relevant criteria. If the wrongness of discrimination is not, fundamentally, an intrinsic feature of each isolated act of discrimination, then it must be a function of its consequences—either the consequences of individual acts or the aggregate consequences of similar acts.

Let us consider these arguments in a bit more detail. Although it is not incoherent to argue that a job should be awarded on the basis of desert, and that we wrongfully discriminate when we do not do so, that principle cannot be right unless we fudge the notion of desert. David Miller says that a person “deserves a particular job when, as far as we can determine, his or her performance in that job will be superior to that of all the other applicants by virtue of his or her own personal qualities and the legitimate reactions of others.”<sup>8</sup> Thus, Miller would argue that if a prospective black employee would perform less well than a white person because of obstructive behavior by a supervisor or fellow employees, it does not follow that he is less deserving—“the predictable performance is not connected in the right kind of way to present facts about the applicant.”<sup>9</sup> Fair enough. But suppose that a law firm is considering candidates, one of whom is a former high-ranking official in the Department of Justice. He may be less talented than other applicants, but the firm has reason to believe that his high profile will bring more business. If the law firm can reasonably aim to maximize its profits (rather than its legal talent), the former official may be the most *qualified* person for the job, but it would be odd to say that he is most *deserving*. We might wrongfully discriminate when we fail to award a

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7. Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149 (1992).

8. David Miller, *Deserving Jobs*, 42 PHIL. Q. 161, 175-76 (1992).

9. *Id.* at 175.

job to the best qualified, but not because we fail to award a job to the most “deserving.”

A rights based approach is not likely to prove more promising. If we take a deontic approach to rights, then we need to determine just who has what rights. A deontic right not to be discriminated against is unlikely to be helpful because it requires us to determine what sorts of discrimination constitute violations of rights and why they do so. If we start with a deontic right of property and association such that an employer has a fundamental right to do with his property what he wishes, then an antidiscrimination argument cannot even get going. On this view, when *A* chooses to hire *B* over *C*, that decision does not violate any rights of *C*, for, as Koppelman puts (but does not endorse) the argument, “[n]o one has a right to compel others to associate with her.”<sup>10</sup> Koppelman wrongly claims that this argument rests on a “dubiously atomistic conception of human life.”<sup>11</sup> After all, the point of such a right is not to remain isolated, but to frame the way in which people should be able to *associate* with each other. Neither Koppelman nor I may like *A*’s reasons for associating with *B* rather than *C*, but it has nothing to do with an atomistic conception of human life. Koppelman may, however, be correct to argue that this approach wrongly assumes that people have deontic property rights independent of the consequences of their acknowledgement. He may be right to maintain that we need not accept a regime of property rights that leaves the state powerless to assist “a permanent outcast population in a state of chronic economic misery. . . .”<sup>12</sup> But that is just to adopt a consequentialist account of rights, in which case we need to determine what regime of rights would produce what sorts of consequences. From that perspective, it is an open question as to what such a consequentialist account will yield with respect to the right to hire and fire.

Some argue that the wrongfulness of discrimination is expressive, that it is a way of demeaning, stigmatizing, or subordinating the target. On this view, which is similar to the “speech act” view that Rae Langton has taken with pornography, the wrongness of discrimination is not to be found in the locutionary force of such acts or in its perlocutionary effects on the target.<sup>13</sup> Rather, it is to be found in its illocutionary force—what it does. Now, I think there is a question as to just what the wrong of

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10. Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right to Discriminate?*, 67 LAW & CONTEMP. PROBS. 27, 33 (2004).

11. *Id.*

12. *Id.*

13. See Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293, 293, 305-08 (1993); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000).

“demeaning” is. There is clearly a distinction between being demeaned and feeling demeaned, where the former is neither necessary nor sufficient for the latter. Suppose *A* spits on *B*, who appears to be a homeless man but who is actually an undercover police officer. *B* may regard *A* as a jerk or may even have sympathy with *A*’s action (had *A* been correct about his target). Has *A* demeaned *B*? Has *A* unsuccessfully attempted to demean *B*? More importantly, it seems that there are many cases of alleged wrongful discrimination that have absolutely nothing to do with demeaning or stigmatizing—at least as those terms are normally understood. Many cases of alleged sexual discrimination are rooted in positive preferences for interacting with, say, males or females and are not based on animus or aversion at all. Consider discrimination in insurance: if insurers are wrong to charge higher premiums to those who are genetically disposed to be at high risk for a disease, it would be silly to say that they are demeaning them or attempting to do so.

So we might say that the wrong of discrimination consists in not treating people on the basis of the criteria on which we ought to treat them. This account may point us in a certain direction, but, of course, tells us virtually nothing as to what criteria are morally relevant or permissible. Moreover, and perhaps more important, if this is the wrong of discrimination, it is not clear just how wrong discrimination is. As Richard Arneson suggests, we are unlikely to regard “whimsical” or “idiosyncratic” hiring practices as seriously wrong because they are unlikely to inflict a “significant psychic wound over and above the loss of the job.”<sup>14</sup> This suggests that much of the wrongness of discrimination is likely to be found in the consequences of patterns of discrimination and not, at least not principally, in a feature of an isolated act.

### C. How Wrong Is Discrimination?

In *Exploitation*, I argued that exploitation, as such, may be less wrong than it is commonly thought to be. Because exploitation is often harmful, we may incorrectly assume that exploitation is seriously wrong when the exploitee is not harmed.<sup>15</sup> Much the same may be true of discrimination. In *What Makes Discrimination Wrong?*, Larry Alexander

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14. Richard Arneson, *Equality of Opportunity*, in STAN. ENCYCLOPEDIA OF PHIL. (2006), available at <http://plato.stanford.edu/archives/win2002/entries/equal-opportunity/>.

15. ALAN WERTHMEIMER, *EXPLOITATION*, at ix (1996).



asks us to assume that acts of discrimination occur within the framework of an otherwise just society.<sup>16</sup> For the sake of argument, assume something like a Rawlsian view of a just basic structure. Let us assume that everyone is granted equal basic liberties, that there is roughly fair equality of opportunity, and that social and economic inequalities are in accord with the difference principle or that society guaranteed an adequate level of economic resources to all those who are able to work. While people may be denied particular jobs or positions (say that men are never or rarely hired as gynecologists), there are ample opportunities for men and women, whites and persons of color, and so forth. Perhaps Jews cannot join a particular golf club, but they are not denied the opportunity to golf or practice their Judaism. Perhaps gay men will not be chosen as Boy Scout leaders, but there are numerous positions open to them. Some fraternities do not accept nerds or jocks or whites or blacks, but there are ample options available to all. Would these forms of discrimination be seriously wrong? I honestly do not know. I am reasonably confident that our *present* intuitions about discrimination are of little help, because those intuitions may well be closely tied to the actual social consequences of discrimination, or to the history of those consequences. If whites and blacks had relatively equal wealth, income, longevity, education, and so forth, it is entirely possible that we would not in fact *regard* isolated acts of racial discrimination as seriously wrong. It is possible, of course, that we would be wrong not to regard such acts as seriously wrong, but then we need an argument that does not appeal to intuitions. My general point remains that it is extremely difficult to know what is driving our intuitions about acts of discrimination when such discrimination has been part of a pattern that has generated massive social and economic inequalities.

I accept what I take to be the dominant line of argument in the legal literature on discrimination, namely, that discrimination is wrong not primarily because it involves individual animus or aversion, but because it contributes to a pattern of social and economic subordination.<sup>17</sup> Interestingly, from that perspective, I believe that both racial and sexual discrimination may be *less* important than they are commonly thought to be. I believe that there is a pattern of racial inequality and subordination, but there is reason to think that racial discrimination, as such, is no longer a primary cause of that pattern. By contrast, there may be cases of sexual discrimination, but I do not believe that there is now a pattern of social and economic subordination.

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16. Alexander, *supra* note 7, at 151.

17. Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837-39 (2003).

Let me begin with sexual inequality. I do not doubt that there are numerous and important ways in which sexual inequality and injustice persist. Still, I think that there are numerous reasons to suggest that sexual inequality is not a pervasive form of social and economic inequality and injustice, and that it is on a declining trajectory. While women experienced significant barriers to entry to educational institutions and to the professions for many years, it did not take long for women to compete successfully with men when those barriers were (substantially) removed. The contrast with racial inequality could not be starker, for when barriers to entry for blacks were (largely) eliminated, blacks were not in a position to successfully compete with whites—and still are not. We know that girls outperform boys in school. We know that approximately 60% of undergraduates are female.<sup>18</sup> We know that some of the traditional bastions of male dominance, such as medical school and law school, now enroll roughly the same number of males and females. We know that women live longer than men. Although a woman is only 14% more likely to die from breast cancer than a man is from prostate cancer, funding for breast cancer research is 660% greater than funding for prostate cancer research.<sup>19</sup> Women do earn less than men, but there is good reason to think that the earnings gap is closing and that much of the gap is attributable to “life style” choices that, even if associated with inequalities within the family, are not attributable to injustices by the employers. To believe in wage discrimination is to believe that employers are prepared to pay men *more* than the market requires (they cannot pay women *less* than the market requires). Moreover, an earnings gap is not a spending gap. Given familial altruism, higher earning males will typically share their income with their lower earning spouses, whereas no form of altruism shifts disposable income from whites to blacks. There is no reason to think that females receive less adequate nutrition or medical care or housing. Although women are more likely to be victimized by sexual offenses, they are less likely to be victimized by violent crimes. Nor should any of this be surprising. For whatever the forms of discrimination that were practiced against women

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18. See CBS, *The Gender Gap: Boys Lagging* (May 25, 2003), <http://www.cbsnews.com/stories/2002/10/31/60minutes/main527678.shtml>; IES NATIONAL CENTER FOR EDUCATIONAL STATISTICS, FAST FACTS (2005), <http://nces.ed.gov/fastfacts/display.asp?id=72> (last visited Dec. 20, 2006).

19. Marty Nemko, *Should We Pay More Attention to Men's Health?*, Sept. 17, 2006, <http://www.martynemko.com/pub/articles/mens-health.shtm>.

in previous generations, girls and boys were raised in the same households. They received the same quality medical care and nutrition. They went to the same schools, and so forth. And so, for the most part, the developed capabilities of males and females have always been quite comparable. Moreover, despite all the worries about socialization and the need for role models, the aspirations of women changed very quickly when barriers to entry were eliminated.

Interestingly, it is quite likely that the decline of sexual discrimination has intensified socioeconomic inequalities that we are loath to describe as discrimination or regard as morally problematic. The problem is assortative mating or homogamy. Both men and women are prone to choose mates with similar levels of educational attainment and similar earning prospects. True, some persons, typically male, might prefer to mate “down” so that they are the more powerful person in the relationship or use their wealth to gain access to “trophy” spouses, whereas others, typically female, prefer to mate “up” so that they can garner the economic benefits of the higher earning mate. But, setting aside the mating prospects of lower socioeconomic status (SES) attractive women, who are able to trade their beauty for income, most persons mate with partners of comparable SES. In some cases, the choices are completely voluntary in the sense that high SES persons prefer to mate with high SES persons and some lower SES persons would be uncomfortable mating “up.” But even where most people would prefer to mate “up,” they will end up with mates at comparable levels because the higher-ranked potential mates will already have been taken.

When one combines assortative mating with the entry of women into the paid labor force and the higher paying professions, the consequence is likely to be an increase in the inequality of household income, wealth, and years of educational attainment. In the world where women were excluded from much of the job force, many desirable positions would go to relatively low ability males because they did not have to compete with higher ability women, and so lower SES women would be able to garner the economic benefits of a higher earning spouse. In a world where women are not excluded from the job force, the lower ability males are unable to get these desirable positions. As a consequence, the high ability couple has two desirable positions and the lower ability couple has none. Here we have a situation in which two forms of differential treatment combine to generate massive social and economic inequalities that are passed down to subsequent generations. First, we have the inequalities of reward for positions that are generated by the market and that tend to reward positions that require higher cognitive abilities. This inequality does not result from any direct differentiation by particular persons, and so arguably does not qualify as any form of discrimination,

even though it is a form of inequality that some have thought to be unjust or at least morally questionable because it depends so much on the brute luck of the natural lottery. Second, we have the inequalities produced by assortative mating. These mating choices are the result of direct differentiations by particular persons, but they do not seem to qualify as wrongful discrimination because they occur in an area of life that we believe should be immune from governmental intervention. I am, of course, not claiming that the decline of sexual inequality is bad. I am claiming that the aggregation of non-wrongful choices may have justice-related consequences which may demand our attention.

By contrast with sexual inequality, racial inequality is a massive social problem in the United States across the whole spectrum of dimensions of well-being: infant mortality, longevity, health, education, income, wealth, housing, single-parent families, and so forth. Yet, even here, it is arguable that racial discrimination is not the primary problem. It is certainly the case that decades of racial oppression and discrimination have played the dominant causal role in generating contemporary racial inequality, but it is much less clear that racial discrimination as such is the primary problem today.

In his important work, *The Anatomy of Racial Inequality*, Glenn Loury argued that racial discrimination “should be demoted, dislodged from its current prominent place in the conceptual discourse on racial inequality in American life.”<sup>20</sup> Loury maintains that while racial discrimination of the standard sort has not vanished, it is universally recognized as a moral problem, and virtually everyone agrees that it should be proscribed. Loury argues that it is of capital importance to distinguish between “discrimination in contract” and “discrimination in contact.”<sup>21</sup> Discrimination in contract refers to unequal treatment on the basis of race in formal transactions, such as the buying and selling of goods and services, whereas discrimination in contact refers to the unequal treatment of persons on the basis of race in “the associations and relationships that are formed among individuals in social life, including the choice of social intimates, neighbors, friends, heroes, and villains. It involves discrimination in the informal, private spheres of life.”<sup>22</sup> Although discrimination in contact may not be as morally objectionable as discrimination in contract, indeed, it may not be morally objectionable at

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20. GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 93 (2002).

21. *Id.* at 95.

22. *Id.* at 95-96.

all, its *real-world* consequences can be just as debilitating for a racially stigmatized group because “the mechanisms of social mobility and intergenerational status transmission . . . are crucially sensitive to the patterns of contact . . . in that society.”<sup>23</sup> Far too many blacks are simply unable to gain access to the social resources that are essential to human flourishing, but which are acquired through informal but race-influenced social intercourse. Loury argues that the central problem today is racial disparity in “developmental opportunities,” and that, as a consequence, the developed capabilities of blacks are significantly lower, on average, than the developed capabilities of whites.<sup>24</sup>

On Loury’s view, discrimination in contact gives rise to an intractable problem. Whereas a liberal state could exercise control over discrimination in contract, any recognizably liberal state must preserve the freedom of individuals to engage in discrimination in contact, and this is so for two reasons. First, “the social exchanges . . . are so profoundly intimate and cut so close to the core of our being that all but the most modest interventions in this sphere must be avoided if liberty and autonomy are to have any real meaning.”<sup>25</sup> Second, whereas the ethical case against discrimination in contract is relatively easy to make, it is much less obvious that there is anything wrong, in principle, with forming or avoiding close personal contact on the basis of racial identity.<sup>26</sup>

The distinction between discrimination in contract and discrimination in contact is correlated with the distinction between *discrimination*, which concerns the way in which people are treated, and *stigma*, which concerns the way in which whites understand and perceive their black compatriots at the cognitive and emotional level.<sup>27</sup> The primary cause of discrimination in contact is that white Americans are characterized by patterns of thought and biased processes of social cognition that lead them to avoid the sorts of contact with black Americans that are crucial to acquiring opportunities for social and economic success. Loury argues that this pattern may justify race-conscious policies that show promise of mediating the attendant effects. On his view, the claim that race is intrinsically of no moral relevance (which he accepts) does not entail the claim that it must be wrong to use race as a basis for public policy.

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23. *Id.* at 99.

24. *Id.* at 94.

25. *Id.* at 96.

26. *See id.* at 96-97.

27. *See id.* at 167.

*D. Mating as Discrimination*

I do not want to pursue those policies here. However, I want to raise the issue of mating once again. Although we do not regard racial preference in mating as a form of discrimination, the fact remains that love is not blind when it comes to color and that this has profound social consequences. If blacks and whites married each other without respect to race (in which case most whites would marry whites whereas most blacks would also marry whites), racial inequality as such would vanish within a generation, although class inequality would remain. I say this not only for the tautologous reason that the children of a black mother or father would typically have a white parent as well, but because the socioeconomic mobility of blacks would increase dramatically. At present, it is difficult for black females to improve their economic situation through marriage, in part because black male unemployment is very high and so many black males are in prison. That would change with a dramatic increase in intermarriage. But while racial intermarriage has increased from 1% of all married couples in 1970 to 5% in 2000, and while hostility towards racial intermarriage has declined (35% favored laws against marriages between blacks and whites in the 1970s; 10% favored such laws in the 2000s), racial intermarriage between blacks and whites is still relatively rare.<sup>28</sup>

Is this a cause for concern? Yes, no, and yes. Larry Alexander writes that “discriminatory preferences are intrinsically morally wrong if premised on error, moral or factual, about the dispreferred.”<sup>29</sup> Now, I do not say that racial preferences with respect to potential mates are based on either moral or factual error, but it is arguable that it would be morally *preferable* if most of us were less responsive to race, if we treated skin color on a par with eye color. I do not think it an indefensible stretch of Alexander’s view to argue that, by this criterion, these kinds of discriminatory preferences are morally wrong. Even if we have a *right* to choose our mates on the basis of any criteria whatsoever (assuming that they also choose us), it may be less than morally optimal to choose them on the basis of certain criteria. We may have a right to do wrong.

So the first answer is yes, racially based mating may be a cause for concern. The second answer may be no. Alexander says that

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28. Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriage*, 60 POPULATION BULL., June 2005, at 3, 7.

29. Alexander, *supra* note 7, at 219.

“[d]iscriminatory preferences are extrinsically morally wrong if their social costs are large relative to the costs of eliminating or frustrating them.”<sup>30</sup> On this two-pronged view, it seems likely that racially biased mating preferences are not *extrinsically* morally wrong. If I am right, racially based mating preferences pass Alexander’s first test: “harmful social effects will ensue from bias, given the numbers and group characteristics.”<sup>31</sup> But they are unlikely to pass the second test. Given the prevalence, strength, and low malleability of these preferences, it seems likely that the social costs of using the coercive powers of the state to eliminate or frustrate them would be even higher. Of course, even if a liberal state should not exercise its coercive powers in this arena, it is an open question as to whether it should use the moral educational powers of the state to motivate people not to choose potential mates by the color of their skin but by the content of their character or whatever other characteristics are morally acceptable for such preferences.

Let us assume that the pattern of racially biased mating choices has harmful social effects, but that people have a right to make racially biased mating choices and that the legitimate use of the legitimate powers of the state is unlikely to significantly alter those preferences. That is not the end of the story. Precisely because society decides to allow racially based mating choices, it may also acquire a responsibility to remedy or soften the harmful social consequences of such choices. We can think of this problem in Rawlsian terms. Rawls argues that a just society will guarantee certain basic liberties to all and that it will also seek to promote equality of fair opportunity.<sup>32</sup> There are, however, limits on society’s ability to realize these ends. For example, Rawls explicitly recognizes that “the principle of fair opportunity can be only imperfectly carried out, at least as long as some form of the family exists.”<sup>33</sup> Put crudely, some families are better than others. We could seek to eliminate the family so as to guarantee equal opportunity, at least in this respect, but that is not only not feasible, it is entirely possible that the freedom to form families is one of the basic freedoms which the first principle requires and which has priority over the principle of fair opportunity. Much the same is true for the arbitrary effects of the natural lottery. Even if it were feasible to equalize people’s natural talents through bio-medical intervention, and Rawls does not consider

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30. *Id.*

31. *Id.* at 163.

32. *See* JOHN RAWLS, A THEORY OF JUSTICE 266 (rev. ed. 1999).

33. *Id.* at 64.

that possibility, it is likely that he would reject that policy on moral grounds.<sup>34</sup>

Enter the “difference principle.” Precisely because there are limits on our ability to realize fair equality of opportunity and precisely because we cannot or should not seek to eliminate arbitrary effects of the natural lottery, Rawls seeks a principle which recognizes these facts and which mitigates their effects. Thus, Rawls advances the “difference principle,” which holds that the more favored may benefit from their undeserved and arbitrary assets but only on certain terms “that improve the situation of those who have lost out.”<sup>35</sup>

We do not need to endorse the entire structure or content of Rawls’s theory. The general point is that if there are moral reasons to allow people to make choices that generate social harm or injustice, we may also have moral reason to address their effects, and particularly so when the choices themselves result from a morally questionable preference structure. Just as social security taxes are the price we pay for not having our parents live with us, a set of social programs or policies that I will not seek to specify here may be the price that we have to pay for allowing people the freedom to indulge their racially biased mating preferences. We can and sometimes should take collective responsibility for harms that we did not cause<sup>36</sup> and for harms that we may have a right to cause.

### III. REACTION QUALIFICATION REVISITED

Give a boy a hammer and everything becomes a nail. As I (re)watched episodes of *Seinfeld*, I noted at least three episodes in which reaction qualifications come to the fore.

BREASTS. In one episode, Jerry and Elaine notice that all the waitresses in their coffee shop are amply endowed. Here is the dialogue:

JERRY: Yeah. Have you noticed anything else that’s different since the new management?

ELAINE: Mmm. They’re putting a little lemon in the tuna. I love that.

JERRY: Beside that. Look at the waitresses.

ELAINE: Yeah? (we see that all the waitresses have big breasts)

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34. *See id.* at 89-92.

35. *Id.* at 87.

36. For example, disabilities and genetic susceptibility.



JERRY: What physical characteristic would you say is common to all of them?

ELAINE: Ah . . . .

JERRY: I mean look at this. Every waitress working here has the same proportions. Wouldn't you say?

ELAINE: Yes, I would say.

JERRY: What's going on here? How is that possible?

ELAINE: Do you think it's a coincidence?

JERRY: No. I haven't seen four women like this together outside of a Russ Meyer film.

(the waitress finally came with the coffee)

ELAINE: (to the waitress) Hi. Excuse me. Who does all the hiring waitresses here?

WAITRESS: He does. (pointing to the manager, Mr. Visaki) In fact we're looking for another girl if you know anyone. (she walks away)

ELAINE: You know what? That's discriminatory. That is unfair. Why should these women have all the advantages? It's not enough they get all the attention from men, they have to get all the waitress jobs, too? [It turns out that these women had similar figures not because the restaurant owner was catering to the preferences of superficial males, but because they were his daughters.]<sup>37</sup>

THE MASSEUR. George and Elaine go to get massages and George finds that his will be performed by a man. Here is the dialogue.

RECEPTIONIST: George and Elaine, right? Could you fill these out for me please? And Elaine, you'll be seeing Julianna, and George, you'll be with Raymond.

GEORGE: Excuse me, did you say 'Raymond'?

RECEPTIONIST: Yes.

GEORGE: But, uh, Raymond is a man.

RECEPTIONIST: That's right.

GEORGE: I can't get a massage from a man.

ELAINE: Why not?

GEORGE: What, are you crazy? I can't have a man touching me. Switch with me.

ELAINE: No, I don't want the man either.

GEORGE: What's the difference, you're a woman. They're supposed to be touching you.

ELAINE: He'd just be touching your back.

GEORGE: He'd just be touching your back too.

ELAINE: No, it could get sexual.

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37. *Seinfeld: The Pilot* (NBC television broadcast, Season 4, Episode 1) (transcript available at <http://www.seinfeldscripts.com/ThePilot.html>).

GEORGE: I know. That's the point. If it's gonna get sexual, it should get sexual with you.

ELAINE: I wouldn't be comfortable.

GEORGE: I would? What if something happens?

ELAINE: What could happen?

GEORGE: What if it felt good?

ELAINE: It's supposed to feel good.

GEORGE: I don't want it to feel good.

[The experience proved traumatic for George because he thinks that he was aroused by Raymond's massage.]<sup>38</sup>

THE CHINESE WOMAN. In this episode, George's mother, Estelle, has a conversation on the phone with a woman named Donna Chang (it has been shortened from Changstein). George's parents have been considering divorce, and Estelle was inclined to take the advice seriously until she discovered that Donna Chang was not Asian. Here is the dialogue.

ESTELLE: You're not Chinese?!?

DONNA: [pause] No.

ESTELLE: I thought you were Chinese!!

DONNA: I'm from Long Island.

ESTELLE: Long Island?!? I thought I was getting advice from a Chinese woman!!

DONNA: I'm sorry . . . ?

ESTELLE: Well! Then, that changes everything!

GEORGE: What?!

ESTELLE: She's not Chinese; I was duped!!

GEORGE: So what?! She gave you advice; what's the difference if she's not Chinese?!?!

ESTELLE: I'm not taking advice from some girl from Long Island!!<sup>39</sup>

Let us suppose that the restaurateur did hire large breasted women because he correctly thought that it was good for business. Let us

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38. *Seinfeld: The Note* (NBC television broadcast, Season 3, Episode 19) (transcript available at <http://www.seinfeldscripts.com/TheNote.html>).

39. *Seinfeld: The Chinese Woman* (NBC television broadcast, Season 6, Episode 90) (transcript available at [http://www.seinfeldscripts.com/episodes\\_overview.html](http://www.seinfeldscripts.com/episodes_overview.html)).

suppose that the majority of people prefer masseuses to masseurs. Let us suppose that people prefer Asian advice givers or Jamaican fortune tellers. Let us suppose, then, that an employer would be making a rational market decision to discriminate on the basis of sex and breast size, sex, and race. Or, as in a recent case, let us suppose that Jazzercise, a franchise operation, is making a rational market decision when it refused to hire a highly fit 5'8" 240-pound woman who sought work as an aerobics instructor because she did not possess a "fit appearance."<sup>40</sup> Would it be wrong for them to do so?

Most legal scholars<sup>41</sup> endorse normatively as well as legally the view that employers should be prohibited from hiring on the basis of race or sex when those hirings are profit-maximizing, because customers, or clients, or "targets," or other employees are prejudiced. Consider Mark Kelman's argument. Kelman defines simple discrimination as "differential treatment despite equality along 'relevant' dimensions,"<sup>42</sup> such as when an employer refuses to hire an applicant on the basis of an irrelevant characteristic just because he has an aversion to persons with that characteristic.<sup>43</sup> Laws prohibiting simple discrimination prohibit the employer from treating people worse than they treat others who provide them equal amounts of money. So if a black widget maker would make just as many widgets as a white widget maker, the employer engages in simple discrimination if he refuses to hire the black applicant because of the applicant's race. Laws prohibiting simple discrimination protect applicants from such "market-irrational treatment."<sup>44</sup>

By contrast, consider a case in which a retailer prefers to hire a white person because he correctly believes that his potential customers will buy more from a white salesperson than a black salesperson even if the black candidate would perform all the "physical" aspects of the job in precisely the same manner as the white applicant. Or similarly, consider a case in which a restaurant owner correctly believes that she will do more business if she hires attractive young women as waitresses rather than men. In other words, we will assume that the employer's decision is not rooted "in animus or false stereotypes but in private economic rationality."<sup>45</sup> As Kelman notes, the positive law is clear. Employers cannot make market rational decisions that reflect racist or sexist

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40. Dan Ackman, *The Case of the Fat Aerobics Instructor*, FORBES, May 9, 2002, available at <http://www.forbes.com/2002/05/09/0509portnick.html> (last visited Dec. 22, 2006).

41. Richard Epstein is a notable exception.

42. Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 840 (2001).

43. *Id.* at 848.

44. *Id.*

45. *Id.*

customer reactions. Kelman argues that we should regard these sorts of reaction qualification cases as a version of “simple discrimination” by the employers. Why? Because the customers themselves are “duty-bound” to treat employees “with whom they deal in an impersonal, capitalist, rational fashion,” and so the right of a prospective employee against discrimination by the employer forbids the employer from acting as an agent for the customer’s illegitimate preferences.<sup>46</sup> Similarly, Samuel Bagenstos states that most scholars “have had little difficulty attributing to employers the animus of their customers or employees,” although many cases seem to involve profit-maximizing rather than “animus.”<sup>47</sup>

Something like this dispute plays itself out in discussions of the “essence” of a business. On one view, many businesses have a particular essence. The essence of an airline is to transport passengers. The essence of a restaurant is to serve food. From that perspective, flight attendants should be chosen on the basis of their ability to assist in transporting passengers safely. On another view, businesses do not have essence. They exist to make a profit, and do so by providing their customers with whatever it is that the customers desire as realized through the market. Kimberly Yuracko argues that the latter view is really an argument “for essences of a different sort,” namely, “market responsiveness, with all the complexity this may entail.”<sup>48</sup> That linguistic move does not collapse the distinction at stake here. For whatever terms we use, there is a crucial difference between the constrained account of business essence to which the Court appealed in *Diaz* and the pluralistic openness of a “market responsiveness” conception of business essence that views businesses as serving the variegated preferences of its customers.

Setting positive law aside, when is it legitimate for employers to take account of the preferences of customers or, more broadly, the reactions of the persons whose reactions to the behavior or characteristics of an

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46. *Id.*

47. Bagenstos, *supra* note 17, at 849 n.66 (citing, for example, John Donohue, who argues that “intrinsic equality measures workers based on the ‘true value of [their] labor’ and disregards any preferences customers or coworkers have against associating with particular classes of workers,” and Owen M. Fiss who has made a similar argument). Bagenstos adds that he sees no need to dispute that view and that he will treat “customer- or coworker-preference-based discrimination as animus-based discrimination.” *See id.* at 849-51 (acknowledging that many forms of present-day problems of discrimination by employers involve maximizing profit and not “animus”).

48. A view adopted by Richard A. Epstein. *See* Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 166 n.63 (2004).

employee are crucial to the position? I shall refer to such persons as reactors. Although I did not solve this issue in JQP, I may have underestimated, if anything, the range of jobs for which reactions are crucial to an employee's effectiveness. Indeed, as our economy becomes increasingly dominated by services as opposed to products and manufacturing, the proportion of jobs in which reaction qualifications (some scholars use the phrase "soft qualifications") will figure prominently will also increase. The case of the racially prejudiced retail customers or the sexist airline travelers grossly understates the problem. Here are some examples:

(I) POLICE OFFICERS

The efficacy of a police officer may depend upon his or her ability to make citizens feel safe, to get suspects to cooperate nonviolently, to encourage citizens to come forth with information, and the confidence of his or her fellow officers, et cetera. In turn, these responses may be influenced by the officer's race, sex, size, demeanor, and so on.

(II) TEACHERS

The efficacy of a teacher depends upon his or her ability to induce learning. This may depend, among other things, upon the teacher's ability to establish order and discipline in the classroom. Student reactions to a teacher's sex, size, and race may all affect the teacher's efficacy.

(III) TEACHING ASSISTANTS

A teacher's ability also depends upon the capacity of students to understand the teacher's speech. American college students often find it hard to understand foreign-born teaching assistants. This may be partially due to preferences, but is most likely a simple function of one's unconscious ability to decipher speech.

(IV) LAWYERS

The efficacy of a lawyer turns, in part, on the way in which other attorneys, witnesses, judges, jurors, and clients respond to him or her. This may not only involve reactions to the lawyer's physical acts, including oral statements and written documents, but to his or her personality, demeanor, aggressiveness, et cetera. Moreover, the success of a lawyer as a source of income to his or her firm depends, in part, upon the preferences of clients. If clients prefer to be represented by aggressive males rather than 5'0" females, then aggressive males will generate more income for the firm and, in that sense, are more qualified, other things being equal.

## (V) ADVERTISING MODELS

Obviously, the efficacy of a model is a function of his or her ability to induce customers to purchase the product. Customers may respond to sex, beauty, bodily shape, height, race, ethnicity, et cetera.

## (VI) ROLE MODELS

It is sometimes argued that other things (roughly) equal, we should hire persons of a particular sex or race because they can serve as a role model for people who identify with that characteristic and where those reactions may be independent of any *action* by the employee.

## (VII) GYNECOLOGIST

The efficacy of a physician is a function of his or her diagnostic and therapeutic abilities, but is also a function of the physician's capacity to induce trust, openness, and compliance in the patient. If females respond more favorably and are more likely to seek out care from a female gynecologist than a male gynecologist, then, *ceteris paribus*, a female will be more effective.

## (VIII) PITCHERS

The efficacy of a baseball pitcher is a function of his ability to prevent the opponents from scoring runs. Period. If batters of a particular team find it difficult to hit a left-handed pitcher, then a left hander is better qualified to pitch against this team even if, on other criteria, he is less able than a right handed pitcher.

## (IX) RESTAURANTS

The market value of a chef is not defined by his or her ability to produce the highest quality food as evaluated by the gourmet, but by his or her ability to attract customers. And the same is true for servers, be it Hooters, Joe's Stone Crab, or Jerry Seinfeld's coffee shop. It is worth noting that Zagat's guides specifically evaluate restaurants on ambience, and there is no reason to doubt that the sex or race or attractiveness or personality of the servers contributes to that ambience.<sup>49</sup> Consider this excerpt from a *New York Times* restaurant review on the day after this paragraph was originally written:

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49. For example, Durgin Park in Boston may require that its servers are rude.

Table XII is defiantly retro and proudly old-fashioned, in terms of both its food and its setting. The long path from the entrance to the dining room is covered in leopard print carpeting. That dining room has white walls with gleaming gold trim and an air of unabashed Old World opulence. . . . The servers wear crisply pressed suits with tightly buttoned jackets, and everything about the way they move and gesture has a somewhat antiquated, but endearing, formality. What they strive to project is not so much affability as respect. Remember those days?<sup>50</sup>

(X) PRIVATE NURSES

As Kim Yuracko points out, female patients may have a distinct preference to be cared for by female nurses.<sup>51</sup>

(XI) SALESPeOPLE

The job of a salesperson is to sell. Customers may respond (consciously or unconsciously) to the race, sex, personality, height, and beauty of the salesperson.

(XII) AIRPORT SCREENERS

When body searches are to be performed, female travelers have a strong preference to be searched by female screeners rather than male screeners (I do not know whether men have any strong preference here). If minimizing passenger discomfort is part of the job's qualifications (it may not be), then women are more qualified to do body searches of female passengers.

(XIII) INTERIOR DECORATORS

If we evaluate interior decorators by their business success rather than aesthetically, customers may prefer effeminate males to more masculine males or females because customers believe that gay men have superior aesthetic taste. A similar phenomenon may hold with respect to hair stylists.

It is clear, then, that the preferences and reactions of persons dramatically affect or even define an employee's job effectiveness and that these reactions can be (consciously or unconsciously) responsive to an employee's race, sex, ethnicity, personality, speech patterns, bodily shape, and so forth. The question is this: When is it morally legitimate for employers to consider the relevant reactions as a dimension of a prospective employee's efficacy in deciding whom to hire? There are only two plausible positions.<sup>52</sup> First, it could be argued that it is *always*

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50. Frank Bruni, *Diner's Journal*, N.Y. TIMES, Feb. 10, 2006, at E41.

51. Yuracko, *supra* note 48, at 170.

52. It would be preposterous to adopt a third view, under which it is always illegitimate for employers to take account of reactions.

legitimate for a business to make reaction-based market rational decisions,<sup>53</sup> even when those reactions reflect preferences of dubious moral legitimacy. Second, it could be argued that it is *sometimes* legitimate for businesses to make reaction-based market rational decisions and sometimes not. Let us assume that some version of the second view is correct. What version? It is clear that our intuitions vary from case to case. I suspect that some cases will produce high consensus, whereas others will not. We are inclined to think that a retailer should not cater to the racial prejudices of his customers, but that it is perfectly reasonable for a university to cater to the sexual preference of its female students in hiring a gynecologist, and that a nursing home could legitimately hire female nurses for its female patients. Can we find a plausible principle by which to make these distinctions?

I think this is very difficult indeed. It is clearly not enough to say that employers should not take account of responder's reactions when they result from prejudice. That begs the question as to what counts as a "prejudice." Was George "prejudiced" against masseurs? Was Estelle "prejudiced" against non-Asian advisors? Are reactions based on non-spurious proxies a case of prejudice? And should we treat all "prejudices" equally? In JQP, I argued that given the social context and given the nation's history, it was more legitimate to hire a black police officer for a black community, if the black officer was more qualified than the white because of reaction qualifications, than to hire a white police officer for a white community for similar reasons.<sup>54</sup> Of course, even if this were so as a matter of morality, it might still make sense for the *law* to adopt a race neutral approach under which these two hirings stand or fall together.

Interestingly, even when it is otherwise illegitimate to count reactions to race, there may be overriding moral reason to do so. Suppose that white citizens in a predominantly white community are less likely to cooperate with black police officers than with white police officers and that, as a result, more innocent people are victimized if blacks are hired. It is arguable that the interests of prospective victims outweigh the interests of job candidates.<sup>55</sup>

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53. Indeed, it could be argued that they should be permitted to make market irrational decisions; however, this Article does not address that argument.

54. Wertheimer, *supra* note 1, at 107.

55. This Article will ignore consequentialist arguments that maintain that, in the long run, it will prove better to "sacrifice" some victims of crime in order to reduce



Whereas some racist and sexist preferences seem to involve aversions, others appear to be “pro” preferences. Whatever else we might want to say, it is obvious that Hooters, Playboy Bunnies, and Southwest Airlines (in its previous incarnation as a “love” airline rather than a low cost airline), do or did not involve sexual distinctions rooted in aversion. Or is it so obvious? Andrew Koppelman seems to want to turn this preference lemonade into a preference lemon:

The idea that women are particularly well suited for the task of flight attendant, for example, is closely associated with the idea of separate, ascriptive spheres for men and women, and *that* idea, we have seen, is closely associated with the devaluation of women. The customers’ preferences thus have a component that is malign, that denies respect for persons. If we respect preferences only because we respect persons, then we must withhold our respect from *these* preferences.<sup>56</sup>

This moves much too quickly. First, unless we tautologically define a male’s desire to be served by flight attendants as equivalent to believing that they are “particularly well suited” for the task, I see no reason to think that the male customers of Southwest Airlines believed that women “are particularly well suited for the task of flight attendant.” Second, it is not clear what it is for that preference to be “closely associated” with another. Third, absent the relevant psychological evidence, I simply see no reason to think that this preference is rooted in a commitment to separate spheres. If Marx’s vision of communist society was one in which people can “hunt in the morning, fish in the afternoon, rear cattle in the evening, criticise after dinner . . . without ever becoming hunter, fisherman, shepherd or critic,”<sup>57</sup> cannot men be attentive fathers to their daughters in the morning, work with female colleagues in the afternoon, and enjoy going to Hooters after work before returning home to their professional wives? Fourth, I simply do not see why this is a malign preference that implies the “devaluation of women” or denies respect for persons. This may be so, but it seems to load much too much psychological weight onto something that may be much simpler and much less malignant. Even in sex, sometimes a cigar is just a cigar.

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racial prejudice and inequality. The principle may be valid and the prediction is plausible; however, it is simply too difficult to assess.

56. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 140 (1996) (emphasis in original).

57. Karl Marx, *The German Ideology: Part I*, in THE MARX-ENGELS READER 160 (Robert C. Tucker ed., 2d ed. 1978) (1932).

*A. Laundering Preferences*

Let us assume what I doubt is the case, namely, that Koppelman's description of these preferences is correct. Does it follow that we should not count such preferences or that we should prohibit others from counting them? Napoleon once said, "[e]ven if I had done wrong you should not have accused me publicly. People wash their dirty linen at home."<sup>58</sup> If we have dirty preferences in our minds, should we move them to the public realm, where, as a matter of public policy, employers are required to launder or discount or ignore those preferences? Koppelman thinks so, as does David Strauss:

The judgment that taste-based discrimination is wrong rests primarily on the view that the taste for racial discrimination is illegitimate. That is, no one should be made worse off simply to satisfy someone else's racial animus. The satisfaction of the desire not to associate with members of another racial group, at least in the employment context, should not count in the social welfare function.<sup>59</sup>

There are two strategies for the principle that we should not allow employers to count the illegitimate preferences of responders. The first strategy adopts a general consequentialist framework and maintains that the long-term consequences of adopting a decision rule of allowing employers to count such preferences has suboptimal consequences if we give equal consideration to the interests of all, but that decision is reached after giving full weight to such preferences in assessing the range of decision rules. All preferences are counted as inputs in the calculation of the best social policy, but the output of the process yields a decision rule that some inputs should be ignored. The second strategy, which is adopted by Koppelman and Will Kymlicka, among others, maintains that a consequentialist argument for counting certain sorts of illegitimate preferences as inputs is inconsistent with the underlying moral motivation for respecting preferences in the first place. As Koppelman puts it, "If we respect preferences only because we respect persons, then we must withhold our respect from *these* preferences."<sup>60</sup>

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58. ROBERT ANDREWS, *THE CONCISE COLUMBIA DICTIONARY OF QUOTATIONS* 150-51 (1989).

59. David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1618, 1625 (1991) (footnotes omitted).

60. KOPPELMAN, *supra* note 56, at 140.

Will Kymlicka argues that if the “deepest principle” for utilitarianism is egalitarian, the notion that “[e]ach person has an equal moral standing,” then it seems inconsistent to count preferences which deny that principle.<sup>61</sup>

It is possible that the first argument works to support preference laundering, but since that would depend upon complicated calculations, I will set that argument aside. With respect to the second argument, here too I am inclined to think that the argument moves much too quickly. Even if we accept the view that consequentialism is best justified as a way of instantiating a commitment to the equal worth of all persons, it simply does not follow that the underlying motivation must be used as a screening device for the inputs into that consequentialism. To exemplify this point, note that Rawls does not insist that individuals in a just society must be motivated by the principles that define the basic structure in which they operate:

Ideally the rules should be set up so that men are led by their predominant interests to act in ways which further socially desirable ends. The conduct of individuals guided by their rational plans should be coordinated as far as possible to achieve results which although not intended or perhaps even foreseen by them are nevertheless the best ones from the standpoint of social justice.<sup>62</sup>

If a just society can allow individuals to be motivated by self-interest, there is no logical inconsistency in claiming that a commitment to the equal moral worth of persons or to equal respect is compatible with counting preferences that do not reflect that commitment. Even when preferences are immoral, it may not be immoral to count them. After all, we respect people in numerous ways, but one way in which we respect people is, within reason, to avoid being too judgmental about their preferences. We generally think it best to grant freedom of speech to those who deny that value. And we might think it best to count the preferences of those who do not as committed to equal respect for all persons.

Indeed, one can go farther. If, as Koppelman suggests, most versions of consequentialism are motivated by a commitment to equal respect for individuals, it could be argued, although Koppelman does not, that this requires everyone to act on that principle. After all, to act on the basis of self-interested desires or to show partiality towards one’s family or friends is not to show equal respect; it does not reflect the commitment to impartiality that motivates consequentialism. This is the view

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61. WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 36-37 (1990).

62. RAWLS, *supra* note 32, at 49.

famously adopted by Peter Singer.<sup>63</sup> Setting aside how individuals should act, it could be argued that, for the same reasons, public policy should refuse to count preferences that do not reflect such a commitment. And that seems to go too far. Now one might try to drive a wedge between the partial preferences that a commitment to impartiality does allow and the prejudiced preferences that it does not. Along with Koppelman, one might say, for example, that it is permissible for me to prefer my wife's interests to a stranger's interests, but not to prefer being served by men rather than women, or women rather than men, or whites rather than blacks. But it is by no means clear how such an argument would go and whether it would prove successful.

Another difficulty with the claim that "illegitimate" preferences should not be counted is that the notion of an illegitimate preference is decidedly ambiguous. If it refers to preferences that should not be counted, then it is simply true by definition, but obviously solves nothing. If it refers to preferences that are bad or less than optimal for people to have, then it clearly ranges much too widely. After all, the market as we know it caters to all sorts of arguably illegitimate preferences: cigarettes, professional wrestling, reality television, SUVs, breast implants, pornographic movies, expensive cappuccino makers, enormous homes, and the like, not to mention bad Chinese food and tofu. We allow people to solicit dates on *christiansingles.com*, *jdate.com*, and *blackpeoplemeet.com*. We can argue about which, if any, of these preferences are illegitimate, but it would be crazy to think that, as a general principle, we could or should try to prevent the market from accommodating illegitimate preferences.

I have not attempted to nor have I produced a knock-down argument against laundering preferences or for the view that all preferences should be counted. If we adopt a general consequentialist strategy, it is an open question as to whether the best regime will allow employers to respond to whatever reactions the responders bring to the table or will instead require employers not to take account of certain reactions and, if so, which ones. On the one hand, there might be utilitarian reasons to adopt a regime in which we accepted people's preferences as we find them, including biased or prejudiced preferences that are demonstrably malign, just as there might be utilitarian reasons to adopt a regime in which people are permitted to act on partiality. At the same time, it is also

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63. Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 230-32 (1972).

possible that from an impartial consequentialist perspective in which we counted all preferences as inputs, we might decide on a regime that discounted such preferences nonetheless because discounting them promoted more utility in the long run, including the utility that would be derived from changes in people's preferences. Consider this analogy: Fred Schauer has argued that while there is nothing wrong, in principle, with using proxies or profiling when they are non-spurious, there might be good reason to prohibit the use of proxies or profiling based on race or sex even when it would otherwise be desirable to do so. For if there is a tendency to overuse certain sorts of proxies and we cannot reliably determine when the use of a proxy is reasonable, the best strategy might be to ban an entire category of proxies.<sup>64</sup> Similarly, here, perhaps it is reasonable for Joe's Stone Crab or Table XII to hire only males in order to create a particular ambiance, but if we cannot reliably distinguish the occupations in which such distinctions make sense from those where they do not, it is possible that it is better to prohibit all such distinction-making.

### *B. Public and Private*

I say it is possible. As Richard Arneson has argued, the ideal of equality of opportunity applies to public life but not to private life.<sup>65</sup> In effect, the argument for laundering preferences in order to combat wrongful discrimination seeks to convert what are arguably private preferences into a target for public policy. Unfortunately, and as Arneson is well aware, it is not as if we begin with a well-established distinction between the public and the private spheres, such that President Clinton's sexual behavior was located in the private realm (or was it the public?). As Fred Schauer puts it, "private" is typically the label we attach to those activities and domains in which, for already decided normative reasons, there is a justified interest in excluding someone else.<sup>66</sup> And so the left is now inclined to argue that sexuality and abortion are matters of the private realm whereas discriminatory preferences are matters for the public realm, while the right is apt to argue that sexuality and abortion are matters of the public realm and discriminatory preferences are matters of the private realm.

It is unlikely to prove correct that all hiring decisions are legitimate targets of public policy. Arneson suggests, for example, that whom a small business hires may be a private matter (it is fine if a restaurateur

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64. See FREDERICK SCHAUER, *PROFILES, PROBABILITIES & STEREOTYPES* (2003).

65. Arneson, *supra* note 14.

66. Frederick Schauer, *Can Public Figures Have Private Lives?*, 17 SOC. PHIL. & POL'Y 293, 293 (2000).

wants to hire his family or friends) but whom it serves is a public matter (it is not fine if he excludes blacks).<sup>67</sup> That is simply a way of saying that the state does not have a sufficient interest in his hiring to justify interference where it may have a sufficient interest in whom he serves. And I take it that virtually no one would deny a family's right to choose a babysitter or nanny on the basis of whatever criteria it prefers, be it race, sexual orientation, or religion, even if we think that some of those preferences do not pass moral muster.

In the previous section I argued that there may be good reasons for the state to adopt a general policy that would require firms to ignore certain preferences even if it were economically rational for them to be counted.<sup>68</sup> And it is possible that this argument will prove decisive. At the same time, it is also arguable that we should be strongly disposed against placing a person's beliefs and attitudes in the public realm, that is, to make them a basis for public policy. At this juncture, I want to bring Thomas Nagel's reflections on moral psychology to bear on our topic. In *Concealment and Exposure*, Nagel maintains that "[t]he grasp of the public sphere and public norms has come to include too much."<sup>69</sup> He argues that many of the conventions of daily life are meant to keep a "great range of potentially disruptive [psychic] material unacknowledged and therefore out of play."<sup>70</sup> This material includes "feelings of hostility, contempt, derision, envy, vanity, boredom, fear, sexual desire or aversion, plus a great deal of simple self-absorption."<sup>71</sup>

It is not just a matter of adopting social conventions that allow us to conceal our innermost thoughts. It is also a matter of putting restraints on the force of morality and conscience: "Everyone is entitled to commit murder in the imagination once in a while, not to mention lesser infractions."<sup>72</sup> As a general principle, "the idea that socialization should penetrate to the innermost reaches of the soul, so that one should feel guilty or ashamed of any thoughts or feelings that one would be unwilling to express publicly" is downright pernicious.<sup>73</sup> So, not unexpectedly for a man of the left who continues to use "he" as a generic pronoun, Nagel argues that "[t]he demand for public lip-service to certain pieties and

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67. Arneson, *supra* note 14.

68. See generally *supra* Part III.A.

69. Thomas Nagel, *Concealment & Exposure*, 27 PHIL. & PUB. AFF. 3, 5 (1998).

70. *Id.* at 6.

71. *Id.*

72. *Id.* at 7.

73. *Id.* at 9.

vigilance against tell-tale signs in speech of unacceptable attitudes or beliefs is due to an insistence that deep cultural conflicts should not simply be tolerated, but must be turned into battles for control of the common space.”<sup>74</sup> And this we should resist.

Nagel is eminently aware that his argument can be understood as being “too protective of the status quo” and that it will not satisfy those who “think it necessary to overthrow pernicious conventions like the double standard of sexual conduct . . . .”<sup>75</sup> Yet he argues that “to the extent . . . compatible with the protection of private rights, it would be better if these battles for the soul of the culture were avoided . . . .”<sup>76</sup> and that:

No one should be in control of the culture, and the persistence of private racism, sexism, homophobia, religious and ethnic bigotry, sexual puritanism, and other such private pleasures should not provoke liberals to demand constant public affirmation of the opposite values. The important battles are about how people are required to treat each other, how social and economic institutions are to be arranged, and how public resources are to be used.<sup>77</sup>

Even if Nagel’s argument is sound with respect to its principal target, it may be thought that it is not entirely on point. For Nagel is primarily concerned with our thoughts and not with our actions, not with how we “treat each other.” It is possible that employer decisions responding to racial prejudices and sexual feelings are of a different order, that this concerns how people are treated and not with what is in someone’s mind. But I think Nagel’s argument still has traction. If firms are required to ignore the preferences or reactions of their customers or clients because we have made a judgment that those preferences are illegitimate, then it is as if the preferences themselves are treated as a form of action. As Kelman puts it, “[c]ustomers are duty-bound under antidiscrimination law to treat salespeople with whom they deal in an impersonal, capitalist, rational fashion . . . .”<sup>78</sup> But it is one thing for one to treat those with whom one interacts in a rational fashion and another to have preferences about the sorts of persons with whom one interacts. I can imagine people who will treat those with whom they *do* interact in an impersonal rational fashion, but who would prefer not to interact with them for reasons that are not impersonal and rational. And it is by no means clear that the world will be a better place when all *those* preferences are put to the test of hyper-rationality.

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74. *Id.* at 23.

75. *Id.* at 28.

76. *Id.*

77. *Id.* at 30.

78. Kelman, *supra* note 42, at 848.

Consider the preference for the beautiful. It is no doubt just as well that antidiscrimination law has not yet treated the non-beautiful as a suspect classification or as a disability that must be accommodated under the A.D.A., although it has been argued that the A.D.A. should be extended in precisely that way.<sup>79</sup> Part of the story here is that the inequalities attached to attractiveness are not as systemic or entrenched as the inequalities of race. Moreover, it is difficult to imagine how we might instantiate a nondiscriminatory principle without doing more harm to those whose interests we were attempting to protect. Still, the literature is replete with disparaging remarks about the preference for “gaze objects” in positions such as food servers and flight attendants. Of course, we are ambivalent about beauty. While we recognize its attraction, we also endorse norms that diminish its importance; “beauty is only skin deep,” “you can’t tell a book by its cover.” Yet the fact is that we are inclined to reject the words of Kahlil Gibran: “Beauty is not in the face. Beauty is a light in the heart.”<sup>80</sup> I think that the preference for beauty is an important counterexample to the case for hyperrationality in the market. I have no doubt but that responding to this preference produces non-deserving losers and that it has decided negative externalities. At the same time, I suspect that the preference can be frustrated only at considerable cost and that we are well advised just to let it go.

### C. Perfectionism

Kim Yuracko may disagree. In her book, *Perfectionism and Contemporary Feminist Values*, and in a series of articles, Yuracko has defended a perfectionist theory of, and at least some features of, antidiscrimination law.<sup>81</sup> Here I focus on her article, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*,<sup>82</sup> in which Yuracko seeks to explain and defend the willingness of courts to allow

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79. See Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035-36 (1987).

80. KAHLIL GIBRAN, *THE EYE OF THE PROPHET* 94 (Margaret Crosland trans., 1995).

81. See KIMBERLY A. YURACKO, *PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES* (2003).

82. Yuracko, *supra* note 48.



employers to exclude men from certain jobs but not others.<sup>83</sup> She argues that the best explanation is to be found in a perfectionist theory, which argues that some choices and ways of life are substantively good whereas others are bad.<sup>84</sup>

Now it is not always clear whether Yuracko is seeking to provide a causal or descriptive explanation of court decisions as contrasted with a normative justification of those decisions. When she asks “why do courts distinguish between strip clubs and restaurants in cases where both are seeking to satisfy customer desire for sexual titillation?”<sup>85</sup> it appears that she is asking a causal question, but there is little evidence that individual judges were relying on anything remotely like her perfectionist theory. If we recast the question in normative terms, we can understand Yuracko as offering her versions of perfectionism as the best justification for these decisions, whatever their motivation. Even this is not quite right. I believe that Yuracko is best understood as offering a justification *for* antidiscrimination law and not as a justification of a particular application of the law. In any case, I want to ask whether her version of perfectionism justifies the sorts of policies that the court has upheld.

So interpreted, Yuracko seeks to justify antidiscrimination law in terms of a customer-focused perfectionism and a worker-focused perfectionism. On closer inspection, Yuracko actually offers two versions of a customer-focused perfectionism: what might be called a self-worth perfectionism and an offense-based perfectionism. A self-worth perfectionist maintains that “government should encourage the values, activities, and ends that are consistent with these better ways of life and discourage those that are not,” and that it can promote this aim by respecting some customer preferences and disrespecting others.<sup>86</sup> From this perspective, accommodating an elderly woman’s preference to shield her body from exposure to males is a legitimate preference that overrides the interest that males might have in working as a nurse. For one’s sense of privacy is “integral to an individual’s conception of self and self-worth.”<sup>87</sup> By contrast, a male’s desire for sexual titillation is not “integral to an individual’s conception of self worth” or, if it is, it should not be. Because it is better for the character of the customer that he not be titillated in this way, this preference cannot trump or override the interests

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83. *See id.* For example, courts have allowed employers to exclude men from the position of Playboy Bunnies and private nurses, but not others, such as flight attendants, restaurant servers, and male prisons. *Id.* at 149.

84. *See id.* at 153.

85. *Id.* at 150.

86. *Id.* at 153.

87. *Id.*

that prospective male employees might have for providing the relevant service. Yuracko's offense-based perfectionism maintains that whereas we may allow workers to engage in sexual titillation where the customer knowingly places himself in a position to be so titillated (as with Playboy Bunnies or strippers), we may want to protect the sensibilities of customers when they encounter women in mainstream businesses.<sup>88</sup>

We might ask two questions about these arguments. First, are they really perfectionist? Second, do the arguments work? I believe that the self-worth argument is plausible, but I am not sure that it is genuinely perfectionist. On one view, a perfectionist policy seeks to advance what is good *for* the targets of the policy as contrasted with the goodness *of* the target. It is by no means clear that not allowing people to satisfy their illegitimate preferences is good *for them* unless we assume that such a policy will shape their character in morally desirable ways and that having a better character is better *for that person*. With respect to the second argument, even if we assume, I believe somewhat implausibly, that people prefer to be shielded from "the jarring experience of having sexuality foisted upon them,"<sup>89</sup> this is an argument from something like Feinberg's Offense Principle rather than a form of perfectionism, unless we supplement it with a distinction between the jarring experiences from which we ought to protect people and those that do not deserve our intervention.<sup>90</sup> Moreover, if most people did prefer not to encounter unexpected displays of other people's sexuality, then we can expect the market to respond without the need for government intervention. Suppose, however, that more people enjoy being confronted with sexuality in traditional business contacts than do not. Under these conditions, it might be argued that the preferences of the "jarred" should take priority over the preferences of the "non-jarred" because they are of greater moral worth. But then the argument once again fails to represent a traditional form of perfectionism, unless it is assumed that not responding to a person's illegitimate preference to be jarred is better for that person than responding to it.

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88. *See id.* at 201 ("When people go to strip clubs, they expect to see explicit displays of sexuality, but when people walk onto airplanes or into hotel lobbies, they do not. Prohibiting sexuality from creeping into these traditional businesses protects such customers from the jarring experience of having sexuality foisted upon them.").

89. *Id.*

90. *See id.*; *see also* JOEL FEINBERG, 2 MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 1 (1985).

All that said, Yuracko's principal line of argument appeals to worker-based perfectionism. Here, she is not so much interested in the distinction between the privacy cases (nurses) and the sexual titillation cases (Playboy Bunnies), but in the distinction between the pure sexual titillation cases (Playboy Bunnies and strippers) and what she calls plus-sex cases, such as Hooters waitresses whose job is to serve food and simultaneously act as a sexual gaze object for the customers.<sup>91</sup> Yuracko argues that when employers explicitly sexualize a job that is in essence a non-sex job, this creates a role confusion for the employee ("Am I a gaze object or a food server?"; "Am I a skilled flight attendant who can help passengers escape in case of an accident or a target for male sexual fantasy?") and frustrates their intellectual development.<sup>92</sup> Yuracko advances an empirical argument and a moral argument. As a matter of empirical psychology, she argues that plus-sex jobs are bad for the employees. As a matter of morality, she argues that we should seek to promote the employee's intellectual development by prohibiting employees from defining their jobs in ways that hinder that development.<sup>93</sup> Yuracko's empirical claim may be correct, although the evidence she cites is decidedly underwhelming. She cites a study of forty male and forty-two female undergraduates in which the subjects were duped into putting on a sweater or a swim suit and then asked to take a math test that was supposedly unrelated to the study.<sup>94</sup> The females in the swim suits underperformed the females in the sweaters. Why? Because being placed in a revealing outfit caused women to focus their mental energy on their body rather than on other tasks, and this self-objectification can occur just from wearing certain kinds of clothes even if they are not being viewed in those clothes.<sup>95</sup> This is not a lot of evidence, although the principal psychological claim may well be right. I suspect, however, that even when women are not required to wear certain kinds of clothes, they are more concerned with their appearance than men, perhaps because men are more concerned with female appearance than women are concerned with male appearance. Despite all the fretting about the fragile female psyche to the contrary notwithstanding, the fact remains that females do better in school than males—by a wide margin. Their self-objectification does not seem to hinder their intellectual development. In general, I suspect that women are more capable of handling the role confusion than Yuracko seems to

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91. Yuracko, *supra* note 48, at 173.

92. *Id.* at 203-04.

93. *See id.* at 207.

94. *Id.* at 208 (citing Barbara Fredrickson et al., *That Swimsuit Becomes You: Sex Differences in Self-Objectification, Restrained Eating, and Math Performance*, 75 J. PERSONALITY & SOC. PSYCHOL. 269 (1998)).

95. *See id.* at 209.

think. My best guess is that many college students leave their jobs at Hooters and go back to studying with full mental energy and with more tips in their pockets than they would otherwise earn, having separated many superficial males from their hard-earned dollars.

Let us grant Yuracko's empirical claim. Should courts seek to promote female intellectual development by prohibiting employers from defining jobs in this way? First, I suspect that Yuracko vastly overestimates the impact of antidiscrimination law in this area. I find it hard to believe her claim that law firms and universities do not make sex appeal an explicit requirement for positions because they are prohibited from doing so.<sup>96</sup> More importantly, Yuracko does not confront the more obvious moral objections to her worker-based perfectionism, which are no less important for being relatively obvious. First, even if sex-plus jobs do impede a woman's intellectual development, it is by no means clear that all reasonable persons must place such weight on the intellect. Yuracko says that "courts may be in a better position than even women themselves to weigh the social costs of women's lost intellectual development," but it is not quite clear what she is claiming.<sup>97</sup> If she is arguing that sex-plus jobs have *social costs* or negative externalities, then courts may be better positioned to weigh those costs than the individual employees themselves. But that argument has nothing to do with perfectionism or the interests of the employees. If she is claiming that courts are better positioned than the employees to evaluate what is good for the employees themselves, then the argument is quite problematic. I have no general objection to paternalism when we have reason to think people are making a *factual* error as to what advances their interests (and perhaps women do empirically underestimate the effect of sex-plus work on their psyche), but I think we must be much more cautious when we engage in moral paternalism, when we believe that a person is not giving appropriate weight to a *value*, be it safety, excitement, intellectual development, or money. It is one thing to compel someone to receive a blood transfusion when they wrongly believe it is likely to be infected with HIV. It is another thing to compel someone to receive a blood transfusion when their religious principles prohibit it.<sup>98</sup>

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96. *See id.* at 211 ("The fact that such jobs do not exist is probably more a function of the state of current antidiscrimination law than of their social inconceivability.").

97. *Id.* at 206 n.218.

98. For example, the religious principles of Jehovah's Witnesses prohibit them from accepting blood transfusions.

I am skeptical of perfectionism cum moral paternalism not because I think that people cannot make mistakes about values and not because I want to place “autonomy” as an inviolable moral principle. I think Jehovah’s Witnesses are making a colossal mistake in refusing blood transfusions. At the same time, I think that the range of reasonable judgments as to what is best for a person is relatively large. Does Yuracko want to compel the Jehovah’s Witness to receive a transfusion? If not, I think she should be reluctant to interfere with a woman’s choice to suffer the cramped intellectual development of a plus-sex job and to receive the income she might thereby earn.

More importantly, we must remember that perfectionism is not just a theory of objective value, although it presupposes such a view. Perfectionism is a *political* theory that claims that it is permissible for the state to use coercion to advance the excellence of its citizens. John Stuart Mill is a perfectionist about value. He believes that some ways of life are better than others. But, for at least two reasons, Mill is a non-perfectionist with respect to political theory. First, as a matter of developmental psychology, Mill thinks that people will develop their capacities best if they are left alone to make choices for themselves, including bad choices, rather than being led to the good choices by the state. Second, Mill is quite skeptical that society will generally make better choices for its citizens than the citizens themselves.<sup>99</sup> After producing numerous arguments for his version of the harm principle, Mill famously offers a probabilistic argument: “But the strongest of all the arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place.”<sup>100</sup> I do not claim here that we should regard the conditions of employment as “purely personal conduct,” but Mill’s skepticism may still apply. Yuracko’s perfectionism presupposes a high degree of confidence that the state’s power will be exercised in ways that advance the interests of women, and that is much more confidence than I can muster. None of this denies the force of *other* arguments for the laws that Yuracko seeks to defend, but before unleashing the various branches of our government to do battle on behalf of any perfectionist vision, we had better be very confident that they will exercise that power wisely. In antidiscrimination law as elsewhere, a healthy liberal skepticism may be in order. Liberalism as second-best may be the best we can do.

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99. See JOHN STUART MILL, ON LIBERTY 163 (George Routledge & Sons 1915) (1859).

100. *Id.* at 123.